FILED
MAY 30 1975
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-6421

POLLY M. HEWLETT,
Petitioner,

v.

STATE OF TENNESSEE,
Respondent.

BRIEF

In Opposition to Petition for Writ of Certiorari to the State of Tennessee, Court of Criminal Appeals

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The respondent, State of Tennessee, in opposition to the petition for writ of certiorari in the instant case would respectfully suggest to the Court that certiorari should be denied.

OPINION BELOW

The opinion of the Court of Criminal Appeals of Tennessee affirming the judgment of conviction in the trial court was filed on August 16, 1974. The Supreme Court of the State of Tennessee denied the petitioner's request for certiorari without opinion on December 30, 1974. The pertinent opinion is made an appendix to this pleading.

JURISDICTION

Respondent adopts petitioner's jurisdictional statement.

STATEMENT OF THE CASE

The petitioner was indicted for the offense of first degree murder by the June 1972 term of the Montgomery County grand jury on June 8, 1972. On January 18, 1973, she was convicted of second degree murder and sentenced to not less than ten (10) years and not more than fifteen (15) years in the state penitentiary. Her motion for new trial, a prerequisite to appeal in Tennessee, was overruled on September 21, 1973. The intermediate appellate court, the Tennessee Court of Criminal Appeals, affirmed the trial court conviction by opinion dated August 16, 1974. The Tennessee Supreme Court denied the petition for writ of certiorari without opinion on December 30, 1974. Petitioner now seeks a writ of certiorari to the Court of Criminal Appeals of Tennessee.

QUESTION FOR REVIEW

The question for review is restated as follows:

Whether the petitioner was denied her right to due process under the Fourteenth Amendment to the United States Constitution by the fact that one prosecution witness was sworn subsequent to, rather than prior to, his testimony.

ARGUMENT

In the instant case, a witness testified for the State without being sworn prior to giving testimony. After direct examination, cross-examination, redirect examination and recross-examination, and after a short recess, counsel for the defendant called to the attention of the trial judge the fact that the witness had not been sworn prior to testifying. The defense then moved for a mistrial. At this juncture, the trial judge recalled the witness to the stand and gave the oath in the traditional manner. At that time, the witness was asked whether his previous testimony had been true to which he answered in the affirmative. Then the trial court swore the witness as follows, "Do you solemnly swear that the testimony that you have given in this case was the truth, the whole truth, and nothing but the truth so help you God?" The witness again answered in the affirmative.

As noted, there was extensive direct and cross-examination of the witness. Counsel made no objection to the proffered testimony of the witness prior to such testimony. It is black letter law that admission of unsworn testimony is a mere irregularity which may be cured and that objection to unsworn to testimony may be waived by failure to make a timely objection. 98 C.J.S. *Witnesses*, Section 98e (1957); 58 Am. Jur. *Witnesses*, Section 549 (1948).

In *Moore v. State*, 33 S.W. 1046 (Tenn. 1896), the Supreme Court noted that there was irregularity in accepting unsworn testimony, but it "would easily and promptly have been remedied by the Court if attention had been called to it during the trial." There, as here, after direct questioning the witness was turned over to the defense attorney and was cross-examined as if fully qualified. The Court held that there was an implied waiver of oath conclusive on the State as well as the defendant.

In *People v. Johnson*, 77 N.E. 1164 (N.Y. 1906), the Court of Appeals considered the constitutionality of a New York statute which waived the oath in instances where children under twelve years of age were to testify. The Court stated that where a rule of evidence left a party a fair opportunity to make his defense and to submit the relevant facts to the jury, it was difficult to perceive a successful attack to such rule based upon constitutional grounds. In *State v. Dowd*, 225 P.2d 400 (Or. 1950), the Supreme Court considered the taking of unsworn testimony from a child where there was no permissive statute as in New York. The Court reiterated the New York court's statement that it knew of no constitutional provision which rendered inadmissible the testimony of witnesses not sworn. Citing Wigmore on Evidence, 3d ed., Section 1819, the Court went on to note that a failure to object to the competency of a witness is a waiver.

Counsel for the petitioner urged for the first time on appeal that when it was discovered that the witness had testified without previously taking the oath, he should have been sworn and again allowed to testify. Such would have been an empty ritual. There are two traditional common law safeguards to insure reliable testimony, to wit: the oath and the right of the adverse party to cross-examine the witness. See *Mid-City Bank and Trust Company v. Reading Company*, 3 F.R.D. 320 (D.C.N.J. 1944). Both of the safeguards were present in the instant case. Further, it is clear that the witness in the instant case having sworn that the testimony which had been given was the truth could be prosecuted for perjury under Tennessee law. See Tenn. Code Ann. §39-3306 and §40-1815. Parenthetically, it is noted that logically a person is more capable of swearing that what he has previously stated was true than what he is about to state will be true.

The defendant has failed to demonstrate any denial of due process or the denial of any right which has refused him a fair

trial. In Re *Oliver*, 333 U.S. 257 (1948); *Morrissey v. Brewer*, 407 U.S. 471 (1972); *Jenkins v. McKeithin*, 395 U.S. 411 (1969); *Specht v. Patterson*, 386 U.S. 605 (1967).

CONCLUSION

For the foregoing reasons, the State of Tennessee respectfully submits that the petition for a writ of certiorari should be denied.

Respectfully submitted

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